

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

WAYLAND DEE KIRKLAND, No. CIV S-02-1266-DFL-CMK-P

Petitioner,

ORDER

D.K. BUTLER, et al.,

Respondents.

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner's notice of appeal, which is also construed as a request for a certificate of appealability.

20 Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of
21 this court's September 26, 2005, dismissal of his application for a writ of habeas corpus for
22 failure to exhaust state remedies. Before petitioner can appeal this decision, a certificate of
23 appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A certificate of
24 appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial
25 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either
26 issue a certificate of appealability indicating which issues satisfy the required showing or must

state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

Where, as here, the petition was dismissed on procedural grounds, a certificate of appealability “should issue if the prisoner can show: (1) ‘that jurists of reason would find it debatable whether the district court was correct in its procedural ruling’; and (2) ‘that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000)). After careful review of the entire record herein, this court finds that petitioner has not satisfied the first requirement for issuance of a certificate of appealability in this case. Specifically, there is no showing that jurists of reason would find it debatable whether petitioner has exhausted state remedies.

Accordingly, IT IS HEREBY ORDERED that petitioner's request for a certificate of appealability is denied.

DATED: May 2, 2007

/s/ David F. Levi

UNITED STATES DISTRICT JUDGE